

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

**PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS OF
DEFENDANT BRIAN KABALA**

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INTRODUCTION:

Defendant Kabala wrongfully asserts two counterclaims against the Plaintiff, the first of which is not a counterclaim at all, but merely a re-stated affirmative defense, and the second of which fails as a matter of law. The Defendant's only actual, pled counterclaim is a cause of action for abuse of process. However, Kabala fails to plead a key element of the cause of action. Specifically, the Counterclaim fails to allege that the Plaintiff engaged in any willful act in the use of the legal process, not proper in the regular conduct of the proceeding.

In fact, Plaintiff's counsel, recognizing the somewhat jaded history of cyber piracy litigation, takes great pains to conduct these proceedings in a highly standardized, professional, and predictable manner, affording defendants every possible opportunity to present and argue their defense. In identifying the Defendants in this case, Plaintiff's counsel followed the only available mechanism known to exist, which is the use of early, limited ex parte discovery. Then, once the Plaintiff identified the Defendants, it gave them multiple warnings of the present litigation and afforded each of them ample opportunity to settle the matter or present evidence to contradict those of the Plaintiff's expert.

Accordingly, the Plaintiff respectfully requests that this Court DISMISS the Counterclaims raised by the Defendant/Counterclaimant BRIAN KABALA.

Respectfully submitted March 27, 2017.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 The Plaintiff is the lawful owner of the copyright for the motion picture
 5 LONDON HAS FALLEN,” a feature-length film distributed in the United States
 6 and markets abroad (hereinafter referred to as the “Work”), having earned over
 7 Two Hundred Million dollars (USD\$200,000,000) in global box office receipts. *See*
 8 Plaintiff’s First Amended Complaint at Ex. 2 [Dkt. No. 7-2](hereafter referred to as
 9 “FAC”). As also noted in the FAC, the Defendant retained the services of a third
 10 party expert, MAVERICKEYE UG (“Maverickeye”), to identify IP addresses of
 11 Internet users engaged in the illegal and unauthorized copying of the Work via the
 12 Internet. *See* FAC at p. 8. In this specific case, Maverickeye identified IP Address
 13 68.96.200.163 as one of the IP Addresses engaged in the unlawful download and
 14 sharing of the Work. *See* FAC at p. 9, Ex. 1.

15 Defendant’s Counterclaims do not question the validity of the Plaintiff’s
 16 copyright in the Work, nor do they make any direct assertion challenging the
 17 technical accuracy or validity of the methods used by Maverickeye to identify the
 18 subject IP Address. While the Counterclaims reference mistakes and inaccuracies
 19 in the work of other experts and investigators in the field, the Counterclaimant
 20 makes no direct claim against Maverickeye or its methods.

21 Using the information collected from Maverickeye, the Plaintiff filed the
 22 present case, identifying the Defendant/Counterclaimant by his IP Address. *See*
 23 Plaintiff’s Complaint [Dkt. No. 1]. Then, pursuant to prevailing precedent, the
 24 Plaintiff moved this court for an order to open limited discovery for the purpose of
 25 identifying the individual associated with the subject IP address. [Dkt No. 3]. This
 26 Court granted that motion on August 30, 2016 [Doc. No. 5], and the Plaintiff
 27 immediately served a subpoena upon the Defendant’s Internet Service Provider
 28 (“ISP”), in which Plaintiff requested from the ISP the name and contact

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1 information of the individual subscriber for each IP address identified within the
2 Complaint.

3 The ISP then, after conducting its own internal investigation of the matter,
4 identified IP Address 68.96.200.163 as belonging to Defendant BRIAN KABALA,
5 residing at 4920 Holly Grove Drive, Las Vegas, Nevada 89130-2232.

6 Again, the Counterclaims make no assertion to challenge the methods or
7 techniques used by the ISP to identify the Defendant as the individual
8 accountholder associated with IP Address 68.96.200.163. Moreover, the
9 Counterclaimant does not appear to even question that an infringement of the
10 Plaintiff's Work occurred using the subject IP Address.

11 After receiving the identifying information from the Defendant's ISP, the
12 Plaintiff prepared and dispatched an initial demand letter to each of the
13 defendants in this case, notifying each defendant of the pending lawsuit, the claims
14 against them, and affording each an opportunity to either settle the case without
15 the need for further litigation or bring forth evidence to contradict the findings of
16 the Plaintiff's expert. As explained in the initial demand letters, the Plaintiff's
17 goal in the early stages of these cases is to establish a clear deterrent against
18 future infringement. To that end, the Plaintiff issued a second, follow up demand
19 letter to each of the defendants and allowed them more than a month of time to
20 address the Plaintiff's concerns before being officially named as a defendant in the
21 present case.

22 On November 22, 2016, the Plaintiff filed its first amended complaint,
23 identifying Defendant Kabala as one of the defendants in the present case. The
24 Plaintiff then, through an independent process server, personally served Defendant
25 Kabala on February 14, 2017. Later, on March 13, 2017, Defendant Kabala filed
26 his answer to the Complaint along with the present Counterclaims.

27 Defendant Kabala alleges two Counterclaims. The first counterclaim is a
28 "Declaration of Non-Infringement," which is really just a reiteration of the

1 Defendant's previously asserted defense, claiming that he did not directly commit
2 the acts of copyright infringement alleged in the Plaintiff's complaint. The second
3 counterclaim is for Abuse of Process. Reviewing the facts alleged within the
4 Counterclaims, Defendant Kabala appears to base his Abuse of Process claim upon
5 the unsupported (and quite frankly illogical) assertion that the Plaintiff "seeded"
6 its own motion picture on the BitTorrent file-sharing network. Defendant Kabala
7 asserts that the Plaintiff deliberately posted its Copyrighted work on the
8 BitTorrent peer-to-peer file-sharing network for the purpose of building the present
9 litigation.

10 Kabala's assertions are not only wholly unsupported, they are illogical. Why
11 would the producer of a Hollywood blockbuster film, costing tens of millions of
12 dollars and set for release in thousands of screens throughout the country and the
13 world, deliberately leak its motion picture over a network where it could be pirated
14 and distributed for free? The very idea defies logic. Any monies that the Plaintiff
15 receives from Defendants in these cases would be easily dwarfed by the revenues
16 the Plaintiff could have earned had its film not been illegally distributed over the
17 Internet.

18 Moreover, as explained below, even if this Court were to accept Kabala's
19 unfounded speculation as fact, it still fails to meet the pleading standards to form
20 the basis of a claim for "abuse of process."

21 II.

22 ARGUMENT

23 A. LEGAL STANDARD

24 In order to survive a motion to dismiss under FRCP 12(b)(6) for failure to
25 state a claim, "a complaint [or, in this case, a counterclaim] must contain sufficient
26 factual matter, accepted as true, to 'state a claim to relief that is plausible on its
27 face.'" *Ashcroft v. Iqbal*, 556 US 662, 678 (2009), citing *Bell Atl. Corp. v. Twombly*,
28 550 US 544, 570 (2007). A claim is facially plausible when the complaint alleges

1 facts that allow the court to draw the reasonable inferences that the defendant is
 2 liable for the misconduct alleged. *Id.* “To be plausible on its face, a claim must be
 3 more than merely possible or conceivable. ‘[W]here the well-pleaded facts do not
 4 permit the court to infer more than the mere possibility of misconduct, the
 5 complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.’
 6 *Lehrer v. Connelly* 2:11 Civ. 735 (D. Nev., March 27, 2012) (quoting *Iqbal*, 556 U.S.
 7 570). “Rather, the factual allegations must push the claim ‘across the line from
 8 conceivable to plausible.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). “A pleading that
 9 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of
 10 action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’
 11 devoid of ‘further factual enhancement.’ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 12 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

13 Meanwhile, to state a claim for abuse of process under Nevada law, the
 14 complaint, or in this case, the counterclaim, must allege: (1) an ulterior purpose for
 15 bringing a lawsuit other than to resolve a legal dispute; and (2) a willful act in the
 16 use of the legal process, not proper in the regular conduct of the proceeding. See
 17 *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002); *Posadas v. City of Reno*, 851 P.2d
 18 438, 444-45 (Nev. 1993) (internal citations omitted). “As previously noted by this
 19 district, ‘Nevada follows the rule, as does an overwhelming majority of states, that
 20 the mere filing of the complaint is insufficient to establish the tort of abuse of
 21 process.’ *Lehrer v. Connelly* No. 2:12 Civ.735 (D. Nev., March 27, 2012) (quoting
 22 *Laxalt v. McClatchy*, 622 F.Supp. 737, 752 (D.C.Nev.1985)). The mere filing or
 23 maintenance of a lawsuit—even for an improper purpose—is not a proper basis for
 24 an abuse of process action”); *Fagin v. Doby Geroe, LLC*, 3:08 Civ. 314 (D. Nev.,
 25 Aug. 2, 2011) (quoting *Joseph v. Markovitz*, 551 P.2d 571, 575 (Ariz. App. 1976)).

26 **B. DEFENDANT KABALA HAS FAILED TO PLEAD A CASE FOR ABUSE OF**
 27 **PROCESS, BECAUSE HE CANNOT POINT TO ANY IMPROPER WILFULL**
 28 **ACT COMMITTED BY THE PLAINTIFF IN ITS USE OF LEGAL PROCESS.**

Even if this Court were to accept the Counterclaimant's unsupported (and wholly illogical) accusation that the Plaintiff's intent in filing the present suit is not to protect its intellectual property, but rather to "elicit settlement funds," even then, the Counterclaimant fails to allege any improper action in the Plaintiff's use of the legal process. Kabala's Abuse of Process counterclaim consists of a single paragraph, in which Kabala asserts that the Plaintiff filed the present case, as well as other cases, to "elicit settlement funds" as opposed to protecting its intellectual property rights. However, at no point within the Counterclaim, or any of the Counterclaimant's alleged facts, does the Counterclaimant allege that the Plaintiff engaged in any improper willful act in its use of the legal process. "Absent any allegation that [the Plaintiff] has engaged in any improper act in prosecuting his present complaint, the counterclaimant [has] failed to state a claim for abuse of process." *Lehrer v. Connelly*, 2:11 Civ. 735 (D. Nev., March 27, 2012).

III.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that this Court DISMISS Defendant Kabala's Counterclaims.

Respectfully submitted this March 27, 2017.

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